money to vacate but that they had refused. The plaintiffs were not prepared to give them an alternative site anywhere on their land. If this reluctance is based on its fear that they may be transgressing the law because of some alleged illegality arising from the non-registration under the Act it is to be hoped that the parties will review the position the Malaysian way in a search for a rational solution.

One need not go so far as Abu Simbel on the Nile to see how a historic temple can be relocated. Damansara Utama was also a rubber estate not very long ago. As one approaches Jalan Damansara from the main Highway Jalan SS 20/27, on the left side of the road are two wayside shrines, one Chinese and the other Indian - both divine beacons to all passers-by of the faith. Inspiration should be readily available there for a solution to this problem which could easily get out of hand if it is not quickly and compassionately resolved.

**DATO' LEONG POW KUE & 3 ORS.**

**v.**

**GAN KIM SING**

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD. NOOR J.
[CIVIL SUIT NO. 23-245 OF 1989]
29 SEPTEMBER 1993

***PRACTICE & PROCEDURE: Order 14 RHC - Whether defendant had a real defence - Defendant solicitor of second plaintiff in the sale and purchase of land - Payment made by plaintiffs in excess for portion already acquired by government - Questions of fact - Whether plaintiff informed of acquisition - Whether defendant negligent - Duty of solicitor - Whether defendant in breach - Questions of law - Defendant acting for second plaintiff only - Whether liable to the others - Vendor compensated for land acquired by government - Whether vendor should have been made a party - Negligence of Land Office - Whether a valid defence - Mitigation of losses - Whether plaintiffs under a duty to mitigate - Apparent conflict of affidavit evidence - Whether merited further investigation.***

***TORT: Negligence - Defendant solicitor to second plaintiff - Duty of solicitor acting in the sale and purchase of land - Whether defendant in breach.***

The case before the Court was an appeal against the order of the Senior Assistant Registrar whereby he gave the plaintiffs summary judgment for RM191,070 with interest and costs.

The claim of the plaintiffs was centered on the excess payment of RM191,070 for the purchase of a piece of land in Johor Bahru ('the said land') on 21 April 1984. The plaintiffs claimed that a sum of RM967,461 was paid for an area of 29,317 sq. ft. at a price of RM33 per sq. ft., whereas the actual area they got was 23,527 sq. ft. The area of 5,790 sq. ft. was acquired by the government on 19 June 1974, pursuant to declaration of intended acquisition under a gazette notification dated 14 April 1973. Declaration of intended acquisition was endorsed on the register document of title on 18 June 1973, but the endorsement of the actual acquisition was endorsed only on 25 July 1988. Compensation of RM25,372 for the 5,790 sq. ft. acquired was received by the registered owner on 20 June 1974, and the said land was then sold to Seng Hup Chan Auto Supply Sdn. Bhd. in 1976.

The defendant was employed by the second plaintiff as solicitor in respect of the said land. He prepared the sale and purchase agreement, which was duly executed in April 1984, and all the plaintiffs were registered as proprietors on 2 December 1984.

The defendant had made a search of the title of the said land on 27 March 1984. The defendant deposed that, by an oversight, he had not looked at the reverse side of the land title search result, that subsequently, prior to the execution of the sale and purchase agreement, he had personally made further inquiry at the land office about the intended acquisition, but the officer who was approached was unable to confirm whether or not there was any actual acquisition of any portion of the said land, and that he had informed the second plaintiff of the intended acquisition.

**Held:**

On the facts and the law, it was clear that there was no fair or reasonable probability of the defendant's having a real or *bona fide* defence.

**[1]** On the facts, it was clear that the defendant had failed in his duty to use reasonable care, skill, diligence and competence in acting as solicitor for the second plaintiff in the sale and purchase of the said land. He had failed in his duty in giving the appropriate information to the second plaintiff by taking competent and careful practitioner. A solicitor's duty was to communicate the information to the prospective purchaser and not merely to see that he obtained a good title.

The defendant had failed to communicate to the second plaintiff the information regarding the intended acquisition. The documentary evidence adduced did not support the claim of the defendant that he had.

Regarding information about the actual acquisition, the defendant's action did not constitute exercising reasonable care, skill, diligence and competence. The defendant should have written in officially to the Land Office to find out further whether there had been an actual acquisition of 5,790 sq. ft. of the said land.

**[2]** The questions of law raised did not require further consideration.

a. The question of law regarding the liability of the defendant to the other plaintiffs was clear. Though the other plaintiffs had not instructed the defendant as solicitor, the defendant ought to have contemplated that his negligence would injure them as they had jointly contributed towards the payment of the purchase price and were registered as owners of the said land. In such an event, a solicitor may be liable to a third person for the tort of negligence.

b. Regarding the issue whether the vendor should have been brought in by the plaintiffs, as being the one overpaid, there was no issue here. It was a matter entirely within the discretion of the plaintiffs. It was open to the defendant, too, to bring in the vendor as a third party, if he so desired.

Further, the negligence of a third party, the Land Office, was not relevant here. A defendant cannot excuse himself for the consequences of his misconduct by proving that the negligence of a third person contributed to the plaintiff's injury.

c. The question of mitigation by the plaintiffs of their losses did not arise on the facts of the case. It had not been shown how the plaintiffs could have avoided the loss incurred in paying the excess sum for the purchase of an area of land which, but for the defendant's negligence and/or breach, they need not have paid for.

**[3]** Regarding apparent conflict of affidavit evidence, the facts were clear and did not merit further investigation as to their truth. There were no questions or issues that merited further investigation that ought to go for trial.

Although in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavits, it is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth.

*[Appeal dismissed with costs].*

**Cases referred to:**

*Neogh Soo Oh & Ors. v. G. Rethinasamy [1983] 2 CLJ 218 / [1984] 1 MLJ 128* ***(refd)***

*Lake v. Bushby & Anor. [1949] 2 All ER 964* ***(refd)***

*Lin Securities (Pte) v. Noone & Co. Sdn. Bhd. [1989] 2 CLJ 844 / [1989] 1 MLJ 321* ***(refd)***

*Ross v. Caunters (a firm) [1979] 3 All ER 580* ***(refd)***

*Tajjul Ariffin bin Mustapa v. Heng Cheng Hong [1993] 3 CLJ 117 / [1993] 1 AMR 1119* ***(refd)***

*Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212* ***(refd)***
*Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali bin Ibrahim [1985] 2 MLJ 226* ***(refd)***
*Banque de Paris v. de Naray [1984] 1 Lloyd's Rep. 23* ***(foll)***

**Other sources referred to:**
**Halsbury's Laws of England,** 4th Edn., Vol. 34, para 77, p. 64

*For the plaintiffs - G.S. Nijar; M/s. Nijar & Nijar*
*For the defendant - Wong Kim Fatt; Gulam & Wong*

**JUDGMENT**

**Haidar bin Mohd. Noor J:**
This is an appeal against the order of the Senior Assistant Registrar whereby he gave summary judgment for RM191,070 with interest at 8% per annum from 12 October 1984 and costs.

The claim of the plaintiffs is centred on the excess payment of RM191,070 for the purchase of the land described as CT. 2881 Lot 5173 Township of Johor Bahru ("the said land") on 21 April 1984. According to the plaintiffs, a sum of RM967,461 was paid for an area of 29,317 sq. ft. at a price of RM33 per sq. ft. (page 3 of exhibit "LYF 1") whereas the actual area they got was 23,527 sq. ft. - a shortage of 5,790 sq. ft. and hence the excess payment of RM191,070. This area of 5,790 sq. ft. was acquired by the government on 19 June 1974 (exhibit "LYF 6") pursuant to declaration of intended acquisition under gazette notification 341 dated 14 April 1973 (exhibit "LYF 16"). Declaration of intended acquisition as published in gazette notification 341 was endorsed on registered document of title on 18 June 1973 (exhibits "LYF 2", "LYF 12"). Compensation of RM25,372 for 5,790 sq. ft. was received by the then registered owner on 20 June 1974 (exhibits "LYF 12", "LYF 13"). According to page 7 "LYF 2" the then registered owner was Chan Wai Chan and Soo Swee Tan as representatives and the said land was then sold to Seng Hup Chan Auto Supply Sdn. Bhd. on 9 October 1976 (page 9 of "LYF 2").

The second plaintiff employed the defendant as solicitor in respect of the purchase of the said land. The vendor was Seng Hup Chan Auto Supply Sdn. Bhd. The defendant prepared the sale and purchase agreement (exhibit "LYF 1") and it was duly executed by both parties on 21 April 1984. All the plaintiffs were registered as proprietors on 2 December 1984 (page 9 of exhibit "LYF 2") apparently by virtue of paragraph 3 of the sale and purchase agreement (exhibit "LYF 1").

From the facts it is not disputed that at the time of the execution of LYF 1, the plaintiffs were "shortchanged" in respect of the area of the said land purchased from the vendor by 5,790 sq, ft. (acquired by the government in 1974). It is also not disputed that the notice of **intended** acquisition of 5,790 sq. ft. was duly endorsed on registered document of title before the purchase of the said land and the endorsement of the **actual** acquisition of 5,790 sq. ft was only endorsed on 25 July 1988, well after the purchase of the said land.

I do not think it can be disputed that the defendant did make a search of the title of the said land on 27 March 1984 (exhibit "GKS 1") where on the reverse of GKS 1 can be seen the endorsement of the **intended** acquisition of the said land. However the area to be acquired is not specified therein. Be that as it may, the issue really is whether the defendant did inform the second plaintiff of the **intended** acquisition as claimed by him in paragraph 4 of his affidavit (encl. 21). The second plaintiff denied (paragraph 8 of his affidavit at encl. 23). If those are the facts I would agree that there is a triable issue that should go for trial. However, the documentary evidence adduced would not seem to support the claim of the defendant.

By way of letter dated 16 September 1988 by Messrs. A.L. Looi, Advocates and Solicitors (exhibit "LYF 17"), acting for the plaintiffs and addressed to the defendant's firm, the following clarification was sought and I quote the relevant paragraph:

> We seek your clarification that, at the time of your land search in March 1984, whether there was any indorsement on the Register document of title of the **intended** acquisition of an area of 5,790 sq. ft.

The defendant replied *vide* letter dated 24 September 1988 (exhibit "LYF 18") as follows:

> M/s. A.L. Looi,
> Advocates and Solicitors,
> Johor Bahru.
>
> Dear Sirs,
>
> Re: C.T. 2881 Lot 5173
> Township of Johor Bahru
>
> We refer to your letter dated 16 September 1988 and confirm that from our record at the time of our search in March 1984, there was no

indorsement on the register document of title of the **intended** acquisition of an area of 5,790 sq. ft. or any area at all.

Your faithfully,

.....

(emphasis added)

The defendant subsequently wrote another letter dated 27 September 1988 (exhibit "GKS 3") cancelling LYF 18 and contended:

Our further investigations revealed that our search at the Land Registry conducted on 27 March 1984 did reveal that there was indorsement of **intended** acquisition under s. 8 of the Land Acquisition Act 1960, *vide* G.N. 341 of 14 April 1973. This indorsement did not mention any fixed area to be acquired.

We did inform Mr. Leong Yoon Fook of the said indorsement through the telephone at 2.15 p.m. on 27 March 1984.
(emphasis added)

"GKS 3" was not sent as apparently by that time Mr. A.L. Looi had passed away in London. According to the defendant "LYF 18" was a mistake as by an oversight he did not look at the reverse side of the land title search result "GKS 1" (paragraph 9 of the affidavit in encl. 21).

Be that as it may, the true position is that the defendant did make a search as GKS 1 clearly showed but to use his own words "by an oversight I did not look at the reverse side of the land title search result "GKS 1". As a result it would seem clear that the second plaintiff could not possibly have been informed of the **intended** acquisition of 5,790 sq. ft. by the defendant as he (the defendant) claimed.

By paragraph 5(e) of his affidavit (encl. 21) the defendant deposed that subsequent to the aforesaid land title search made on 27 March 1984 and prior to the execution of the sale and purchase agreement by the second plaintiff on 21 April 1984 he personally made further inquiry at the Land Office about the **intended** acquisition *vide* G.N. No. 341 of April 1973. According to the officer whom he approached (though no name was mentioned) the officer was unable to confirm whether or not there was any **actual** acquisition of the 5,790 sq. ft. or any other area. Though admittedly the **actual** acquisition of 5,790 sq. ft. was actually endorsed on the register document of title on 21 July 1988 (a lapse of 14 years from date of **intended** acquisition) the **actual** acquisition of 5,790 sq. ft. was completed as early as February 1974 where compensation of RM25,372 was paid to the then registered owner. If what the defendant deposed to in paragraph 5(e) of his affidavit is true, he would have got the information about the **actual** acquisition of 5,790 sq. ft. from the Land Office as the details relating to the **actual** acquisition of 5,790 sq. ft. would definitely be in the record or file of the Land Office.

Further, if what the defendant deposed in paragraph 5(e) of his affidavit is true, can it be said that such an action could properly constitute exercising reasonable care, skill, diligence and competence in acting as solicitor for the second plaintiff in the sale and purchase of the said land? Such an action is the opposite of the reasonable care, skill, diligence and competence of the subsequent solicitors, Messrs. A.L. Looi who officially wrote to the Land Office inquiring about the **intended** acquisition *vide* G.N. No. 341 of 1973 rather than making a verbal inquiry.

What the defendant needed to do is simple - write in officially to the Land Office as Messrs. A.L. Looi did, to find out whether there has been an **actual** acquisition of 5,790 sq. ft. By doing so he could very well be protected against subsequent possible action for negligence. Further, if it is true that he did inform the second plaintiff of the **intended** acquisition I am sure the second plaintiff would firstly inquire about the details of the **intended** acquisition, that is, the purpose and the area intended to be acquired. In that event, even if the second plaintiff decided to proceed with the purchase of the said land, he and the other plaintiffs would certainly not have paid the excess sum of RM191,070! As a solicitor acting for the second plaintiff, it is his duty to check the gazette notification to find out the area and the purpose of the intended acquisition especially when it turned out that it was for the purpose of a mosque which may or may not be suitable to the second plaintiff to purchase depending on the object of his purchase of the said land. In this respect Gunn Chit Tuan J. (as he then was) in *Neogh Soo Oh & Ors. v. G. Rethianasamy* [1984] 1 MLJ at p. 128 - quoted *Lake v. Bushby & Anor.* [1949] 2 All ER 964 as follows:

The Court held that the solicitors' duty was to communicate the information to the prospective purchaser and not merely to see that he obtained a good title, and having failed to do so, they were liable in an action for damages for negligence.

On the facts, it would seem clear to me that the defendant had failed in his duty to use reasonable care, skill, diligence and competence in giving the appropriate information by taking such action as the facts of this particular case demanded of a normally competent and careful practitioner.

The learned Counsel for the defendant also contended that there are questions of law that require further consideration and relied on the judgment of V.C. George J. in *Lin Securities (Pte) v. Noone & Co. Sdn. Bhd, (Klang Jaya Bahru Development Bhd., Third Party)* [1989] 1 MLJ 321. The questions of law are:

(a) as the other plaintiffs did not instruct the defendant as solicitor - can they claim damages against the defendant as there is no privity of contract.
(b) whether the second plaintiff and/or other plaintiffs should have brought in the vendor of the said land to recover the loss as the vendor was the one who was overpaid. Alternatively, relying on the negligence of the Land Office as a defence.
(c) the plaintiffs should mitigate their losses.

*Question (a):*

Paragraph 3 of the sale and purchase agreement (exhibit "LYF 1") provides for nomination of nominees. Therefore the defendant ought to have contemplated that his negligence would injure the other plaintiffs as they were registered as owners of the said land. They jointly contributed towards the payment of the purchase price. In that event a solicitor may be liable to a third person for the tort of negligence. (see *Ross v. Caunters (a firm)* [1979] 3 All ER 580). The question of law is clear here as opposed to the case of *Lin Securities (Pte.)* where V.C. George J held that the law was complex and required further consideration.

*Question (b):*

With respect, this is no issue at all. Whether the vendor who gained by the overpayment should be sued or not is a matter entirely within the discretion of the plaintiffs (*Tajjul Ariffin bin Mustapa v. Heng Cheng Hong* [1993] 1 AMR 1119). It is still open to the defendant if he desires to bring in the vendor as a third party in this suit but so far he has not done so.

In respect of the negligence of a third party, the Land Office, as a defence, the short answer to that can be found in **Halsbury's Laws of England** (4th Edn., Vol. 34 paragraph 77 at p. 64:

> A defendant cannot excuse himself for the consequence of his misconduct by proving that the negligence of a third person contributed to the plaintiff's injury.

The above passage was quoted in *Neogh Soo Oh & Ors. v. G. Rethianasamy* [1984] 1 MLJ at p. 129.

*Question (c):*

This question does not arise on the facts of the present case. The issue is simple. There was an overpayment of RM191,070 and this is not disputed by the defendant. It has not been shown how the plaintiffs could have avoided the loss incurred in paying the excess sum for the purchase of an area of land (5,790 sq. ft.) which, but for the defendant's negligence and/or breach, they need not have paid for. With respect, the cases quoted by the learned Counsel for the defendant on this issue have no application on the facts of this case.

In dealing with apparent conflict of affidavit evidence, the judgment of the Privy Council in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 provides a good guideline where at page 217, Lord Diplock said:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavits, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statement by the same deponent, or inherently improbable in itself it may be.

Further on his Lordship went on to say:

> It is for him to determine in the first instance whether statement contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth.

In my view the facts are obviously clear and do not merit further investigation as to their truth. There are no questions or issues that merit further investigation that ought to go for trial. In this respect I would, as Mohamed Dzaiddin J (as he then was) did, in *Syarikat Kerjasama*

*Serbaguna Tunas Muda Sungai Ara v. Ghazali bin Ibrahim* [1985] 2 MLJ at p. 226 adopt the statement in the judgment of Ackner LJ in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 23 to the following effect:

> It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendant's having a real or *bona fide* defence.

On the facts and the law, it would seem clear to me that there is no fair or reasonable probability of the defendant's having a real or *bona fide* defence.

For the reasons set out by me I dismiss the appeal with costs. The order of the Senior Assistant Registrar is affirmed.

**GENTARO TANAKA & ANOR.**

**v.**

**SHOGO FUKUOKA & 9 ORS.**

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. D5-22-190-93]
10 JUNE 1993

***INJUNCTION: Application to set aside interlocutory injunction - Damages - Whether there exists serious question to be tried - Question of balance of convenience - Whether plaintiffs foreigners material to undertaking of damages - Whether writ served out of jurisdiction - Whether leave required - Section 23 Courts of Judicature Act 1964 - Order 6 r. 5 Rules of the High Court 1980.***

The plaintiffs claimed that the first defendant had breached a joint venture agreement to purchase property with a view for resale and the proceeds to be shared at a certain ratio. The plaintiffs thus obtained an interlocutory injunction against all defendants with the usual undertaking for damages. The defendants applied to have the injunction set aside on the grounds that the plaintiffs being foreigners were outside of jurisdiction and having no assets in the country rendering their undertaking to damages useless whereas the first defendant through the second to the tenth defendant had assets within jurisdiction. The defendants also claimed that no leave was obtained to serve the writ out of jurisdiction as the first and ninth defendants are foreign nationals.

**Held:**

**[1]** On the question of jurisdiction and leave, leave was not necessary as eight of the defendants are in Malaysia and it is within the plaintiffs right to issue concurrent writs to all the defendants. Furthermore all the defendants had already entered unconditional appearance.

**[2]** It is not the Court's function to resolve conflicts of evidence on affidavits as to facts on which the claim either party depends on with detailed arguments which are only for consideration during trial.

**[3]** There must be on the facts of the case a serious question to be tried raised by the plaintiffs and here the plaintiffs have successfully done so.

**[4]** On the facts deposed the balance of convenience here are in favour of the plaintiffs.